SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 341.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ALBERT J. VLASAK,
Defendant-Appellant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

The first count of the indictment in this case charged that on or about the 31st day of May 1963 Albert J. Vlasak, then a duly elected, qualified and acting member of the Board of Education of the City of Garfield Heights, while holding said office of trust, did unlawfully and corruptly have an interest, directly and/or indirectly, in the purchase by said Board of Education of certain land from the Conte Land Company for the use of said Board, in violation of Section 2919.08 of the Revised Code. The second count, charging bribery in connection with the same transaction, was dismissed by the court in the course of trial.

The jury returned a verdict finding the defendant guilty as charged in the first count of the indictment. The Court of Appeals for Cuyahoga County affirmed the judgment of the trial court without opinion. The Supreme Court of Ohio refused review.

THE STATE'S EVIDENCE.

At the time in question Mr. Vlasak was a duly elected member of said Board of Education of Garfield Heights, Ohio, and was acting as its president. The contract referred to in the indictment is an agreement (St. Ex. 3) for the sale of real estate entered into as of May 21, 1963, wherein one Ralph Conte agreed to sell and the Board agreed to buy seven lots upon the terms and conditions specified in the agreement. The agreement was executed on behalf of the Board by Albert Vlasak as president and Jack Wilson as clerk-treasurer pursuant to an enabling resolution of the Board adopted May 20, 1963, entitled:

"RESOLUTION VOIDING AGREEMENT AUTHORIZED ON OCTOBER 8, 1962 FOR THE PURCHASE OF CERTAIN SUBLOTS ON ANDOVER BOULEVARD AND AP-

PROVING A NEW AGREEMENT AS DRAWN UP AND APPROVED BY MR. WILLIAM TOSKI, LAW DIRECTOR."

The agreement of October 8, 1962 (St. Ex. 2) between Ralph Conte and the Board covered the sale and purchase of the same lots, which the Board needed to provide parking space at the Garfield Heights High School. As a condition of the sale Conte was to alter at his sole cost and expense the grading and draining of the lots to conform to drawings and specifications. The total purchase price was $75,000.00, of which $40,000.00 was to be paid upon completion of the grading and draining and delivery of the deed, and $30,000.00 within two years thereafter provided "seller has consummated or caused to be completed, paving of Andover Boulevard and Valley Lane Drive so as to provide continuous vehicular access to Turney Road."

The grading work was an earth-fill operation wherein earth was moved from nearby land Conte also owned onto the property the school board was buying. Conte employed an excavating contractor named Portale to do the earth moving for the land fill.

Early in 1963 one W. E. Cotleur, a paving contractor, whose firm was the W. E. Cotleur Construction Company, received a phone call from Portale, who said he was quitting the excavating business and had some equipment for sale. Cotleur, who knew Portale was working for Conte on the earth fill on the land Conte was selling to the school board, asked Portale about the Conte job, if there was any way he could "get a whack at it" (R. 208). He was told Conte "will take the bids."

Some time early in 1963 Cotleur had occasion to meet the defendant Vlasak, who was working part-time for the M. & J. Builders' Supply Company, a structural steel busi-

ness, which was owned by one James Kluter and occupied part of the building in which Cotleur had his office. Cotleur saw Vlasak frequently at the M. & J. office, and on occasion Cotleur, Vlasak and Kluter went out for drinks. Cotleur brought up the subject of Conte in a conversation with Vlasak at the Cotleur office, in a conversation he described as follows (R. 209):

> "A. And in effect I asked him if he knew Ralph Conte.
>
> And he said, yes, that he did, that he knew Ralph quite well. He asked me why. I told him that Charlie Portale—well, I told him the same thing that I just repeated before, and that I would like the opportunity to get a whack at bidding this job.
>
> Now, Al suggested—well, I don't know whether he suggested that we have lunch or meet him or stop over there, but I know I did go over to the bar, and from there on in I met Ralph Conte. I think Al Vlasak introduced me the second time to Ralph Conte."

At this meeting Conte told Cotleur that when he was ready to do something with them they could get hold of the plans and specifications and they could bid on it. Cotleur knew at that time that Vlasak was a member of the Garfield Heights School Board. Cotleur continued to pursue the subject of the Conte job with Vlasak. At R. 212 the following testimony appears:

> "A. Oh, I had mentioned on occasion to Al, possibly every occasion that I had seen him, or—not like every day, but if I had seen him every day maybe once a week I would ask him if he had heard from Ralph or if he knew if there was any activity going on relative to this bid that he was going to take on his land fill, or the land fill or the fill.
>
> And he said on a number of occasions, no, he wasn't ready for bids yet, but that I would be notified,

I mean Conte would notify me and that we would get a chance to bid it."

There was a discussion between Cotleur and Vlasak about the fact that Conte was to develop the entire street and whoever got the first bid (for the land fill) would probably do the balance of the work for him. Cotleur kept pushing Vlasak to have Conte give him the plans and specifications for the land fill. After he obtained the plans, Cotleur figured and refigured it and there was a disagreement with Conte as to the amount of earth that had to be moved. Conte had set one figure (35,000 yards) on the amount of dirt and Cotleur had set another, 48,000 to 50,000 yards. Conte proposed a figure of $13,000; Cotleur's first bid was around $26,000, $27,000, $28,000. (Conte admitted on the witness stand that he had tried to swindle Cotleur while they were negotiating the amount to be paid for the job.) Sometime in March a figure of $20,000 was agreed upon at a meeting between Cotleur and Conte. Before that Cotleur had a discussion with Vlasak, which he related at R. 216, 217:

"A. When I had all the figures and the figures were given to me and I met with Ralph—and as I recall it, when I met with Ralph, I had known or at least I had been so informed to a degree, not directly, that there was a lot of time and monies spent, whether it be basically on their own or because of the matter regarding the school or regarding this dirt contract, that I had told Al Vlasak that I had figured a thousand dollars into this contract for him to compensate him.

Q. You told this to Al Vlasak?

A. Yes, I told this to him.

Q. That you figured a thousand dollars into what, sir?

A. Into the price.

Q. Into the price to who, sir?

A. To Ralph Conte.

Q. In other words, your bid price would include a thousand dollars for Albert Vlasak—

A. That's right.

Q. —for his participation in this contract?

A. For his expenses and time.

Q. I see. And this you told to Albert Vlasak in person?

A. I told this to Al after I had submitted the price to Ralph, * * *."

Cotleur said he did not tell Vlasak the figure he was bidding was $20,000. On fairly frequent occasions the Cotleurs, the Kluters, several Kluter and Cotleur employees and Vlasak were going out to dinner together.

On May 6, 1963 Conte appeared at a meeting of the Board of Education members and submitted a letter to the Board stating that his contractor had determined there was more cut and fill to be made than was originally contemplated and Conte therefore wanted additional compensation over the $75,000. The Board subsequently met informally to discuss this. Frank Kniola, a board member present at the caucus, "didn't want any part of it" but the other members, including Mr. Vlasak, were in favor of and agreed to an increase. At the formal public meeting of the Board on May 20, at which the resolution rescinding the October contract and approving a new contract with Conte was adopted, the only dissenting vote was Kniola's. The new agreement, dated May 21, 1963, provided that Conte would receive a total of $88,579, which was $13,579 more than the first contract called for. The new agreement also provided for a first payment of $50,000 to Conte instead of the $40,000 stipulated in the earlier agreement.

On May 28th a check of the Board of Education for $50,000 was drawn to the order of the Ohio Title Company, escrow agent, and mailed to it. The title company received the check on May 29th. Two days later, May 31st, the title

company issued its check for $50,000 to the order of Conte. The check was picked up either by Conte or someone acting as his agent. On the same day Conte's check for $20,000 was received by the W. E. Cotleur Construction Company. As soon as Cotleur received Conte's check on May 31st he immediately paid Mr. Vlasak $2,000 by check dated May 31, 1963 (St. Ex. 10). Cotleur handed the check to Vlasak in the office of the Cotleur Construction Company. In fact, Vlasak was in the office when Cotleur made out the check.

When the check register for the Construction Company was turned over to the authorities, it showed an entry of May 31, 1963 for $2,000.00 but no payee was named. Instead, the words "Engineering services" were written in the name column. Mr. Cotleur said he wrote that down when he made out the check. However, Mr. Himbaugh, a former official of the firm, testified that when he saw this entry for the first time, in August or September of 1963, the writing "Engineering services" did not appear opposite the $2,000.00 check of May 31. When he asked Cotleur about the item, he was told, "Don't worry about it, it doesn't concern you." (R. 373.) Mr. Vlasak was in and out of Cotleur's office but to Mr. Himbaugh's knowledge Vlasak never did any work for the Cotleur firm from January 1963 to November 1 of that year.

ARGUMENT.

The gravamen of the offense under Section 2919.08 of the Ohio Revised Code is that the public officer, agent or employee shall be *interested* in a contract for the purchase of property for the use of the public body with which he is connected. The petitioner Vlasak was a member of the Garfield Heights Board of Education. This Board made a

contract with Conte, and if Vlasak had any interest in that contract with the Board he was violating the statute. It was his interest in the contract, not any employment status with Conte or Cotleur, that constituted the offense in this case. The evidence clearly establishes such interest.

No tenable question of either due process or equal protection of the laws is therefore presented by the petition for certiorari. The questions stated in the petition present only questions of state procedure in providing for final argument (Ohio Revised Code 2945.10) and the applicability of the state statute (forbidding any person holding an office of trust or profit from having an interest in a contract for the purchase of property for the use of the public institution with which he is connected, Ohio Revised Code 2919.08) to the circumstances of the case.

State courts have the final authority to interpret and, where they see fit, to reinterpret the state's legislation. *Garner v. Louisiana*, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. The construction of a state's statutes by its court of last resort must be accepted by the United States Supreme Court. *Williams v. Oklahoma*, 368 U. S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516. By refusing to review and dismissing petitioner's appeal as of right for the reason that no debatable constitutional question exists in this case, the Supreme Court of Ohio gave implicit approval to the trial court's application on the statutes in question and to the finding by the Court of Appeals of "no error prejudicial to the appellant."

The conduct of a criminal trial in a state court cannot be reviewed by the United States Supreme Court unless the trial was had under some statute repugnant to the Constitution of the United States or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. *Williams v. Mississippi*, 170

U. S. 213, 18 S. Ct. 583, 42 L. Ed. 1012; *Gibson v. Mississippi*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

There was no deprivation of the petitioner's constitutional right to due process in the circumstances of this case. The writ should therefore be denied.

Respectfully submitted,

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